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GERBANG PERDANA SDN BHD v. MTD ACPI ENGINEERING BHD & ANOR

HIGH COURT MALAYA, SHAH ALAM
AZIMAH OMAR JC
[CIVIL SUIT NO: 22-1026-2009]
B 24 NOVEMBER 2015

CONTRACT: *Construction contract – Sub-Contract – Whether first defendant entitled to claim payment for works done under Sub-Contract – Whether Sub-Contract between parties mutually terminated – Whether plaintiff had rights to*
C *retain monies from ex gratia payment which first defendant was entitled to – Whether retention of first defendant's entitlement justified*

CONTRACT: *Construction contract – Third party claims – Government repudiated main contract – Claim by third parties for work done – Plaintiff incorporated first defendant's claim in toto – Whether payment due to first defendant – Whether Sub-*
D *Contract between plaintiff and first defendant mutually terminated – Whether first defendant sufficiently remunerated for all works done – Whether plaintiff enriched when receiving and retaining payment granted by Government in consideration of first defendant's work done – Whether first defendant entitled to compensation*

E This suit revolved around a construction contract, known as "Design, Construction, Completion and Commissioning of Gerbang Selatan Bersepadu Road Bridge, Rail Bridge and Associated Works At Johor Bahru" ('Bridge Contract') and a construction contract known as "Design, Construction, Completion and Commissioning of Integrated Customs, Immigration and Quarantine Complex at Johor Bahru ('CIQ Contract') F wherein both the contracts were combined into one development project named as "Projek Gerbang Selatan Bersepadu ('the GSB Project')". The plaintiff ('Gerbang Perdana') was appointed by the Government of Malaysia ('Government') as the main contractor to carry out the GSB Project ('main contract'). The plaintiff then divided the scope of the GSB project into G several packages and one of the packages under the Bridge Contract was "land approach RBS 03" ('the Sub-Contract'), which this suit was concerned with. The Sub-Contract was between the plaintiff and the first defendant (MTD ACPI Engineering Berhad) and the second defendant (IC & E Group Sdn Bhd) whom were in essence an unincorporated joint venture ('the JV') H bound by a JV agreement, and performing a portion of the works under the main contract. The crux of the dispute arose when the main contract was repudiated by the Government. The Government then ordered Gerbang Perdana to submit its claim for works done, inclusive of the claims of any

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third parties aggrieved by the termination. Gerbang Perdana then undertook against the Government to collect claims, proof of claims and thoroughly and properly assessed the claims of third parties (inclusive of the JV) in its letter to the Government. The first defendant then duly submitted its claims to Gerbang Perdana with documentary proofs. Gerbang Perdana incorporated the first defendant's claim *in toto* and appended the whole documentary evidence of the first defendant's claim in Gerbang Perdana's final claim to the Government. Consequent to Gerbang Perdana's final claim, the Government issued an *ex gratia* payment of RM154,999,999 to the plaintiff to cover the whole extent claims from the third parties claim *vide* the plaintiff (inclusive of the first defendant's claim). The Government had paid a sum of over RM257 million to Gerbang Perdana, of which RM102 million was for works done and RM155 million was for compensation. However, after claiming the full width and breadth of the first defendant's claim, the plaintiff refused to furnish the payment to the first defendant for its portion of works done. The plaintiff submitted that (i) the Sub-Contract had been terminated *vide* a tri-partite meeting between the parties on 13 February 2006 and (ii) the first defendant had not performed what it had claimed and had been adequately paid with an interim payment in which Gerbang Perdana contended to be the only work done by the first defendant. The plaintiff in this action prayed to this court for a declaration that the Sub-Contract had been mutually terminated and that the first defendant was not entitled to claim against the plaintiff. The first defendant, on the other hand, contended that there were two issues to be decided at this liability stage of the proceeding, namely (i) whether the Sub-Contract had been mutually terminated on 13 February 2006; and (ii) whether the first defendant was entitled to obtain the benefit of the compensation paid by the Government under the Main Contract to the plaintiff, in respect of the first defendant's works under the Sub-Contract.

Held (dismissing plaintiff's action with costs):

(1) The entitlement or non-entitlement over the payment is contingent upon works done, and evidence proving that the works are done. The entitlement to pay for works done is not contingent or dependent on the survivability of a contract. Even if a contract was subsequently terminated, whatever obligations to pay that arose during the tenure and life of that contract remained even after the demise of the contract. The parties were in a mutual state of mind that Sub-Contracts were to be compensated for the works done which was a payment of Reliance Interest. The obligation to pay for works done encompasses the life and demise of the contract and an aggrieved party to a repudiation of a

A contract is entitled to be compensated for expenses incurred in reliance and/or furtherance of the contract. (paras 16 & 17)

(2) No mutual termination was agreed upon during the tripartite meeting between Gerbang Perdana, the first and second defendant, the exchange of correspondences and in the exchange of draft deeds of termination. B Although the plaintiff's witnesses contended that such mutual termination was agreed upon during the tripartite meeting, their testimony did not stand the test of the cross-examinations and the contemporaneous documents. Contemporaneous documentary evidence trumps over, and has greater probative value against self serving oral C evidences (*Leisure Dotcom Sdn Bhd v. Globesource Sdn Bhd*; refd). Documentary evidence overwhelmingly indicated that there was no mutual termination agreed upon. (paras 31 & 32)

(3) In admission of the subsistence and operability of the Sub-Contract even after the tripartite meeting, the negotiations of the Broad Terms of D Mutual Termination ('Broad Terms') as contended by the plaintiff, and the exchange of draft deeds of termination, the plaintiff had requested the first defendant to submit its claim in clear adherence and reliance of cl. 29 of the conditions of contract contained in the Sub-Contract. This directly contradicted the plaintiff's contention that the parties had E reached a mutual termination of the Sub-Contract after the tripartite meeting. Further, nothing was agreed, nothing was absolute, nothing was signed and executed, and ultimately there was no mutual consensus on the termination of the Sub-Contract. Counter-proposals/offers are not by any stretch of the legal and logical imagination a qualified F acceptance. (paras 43, 44, 53 & 55)

(4) In the plaintiff's claim to the Government, the plaintiff had spared nothing at all, not any portion, nor any part of the first defendant's claim, and had incorporated the first defendant's claim *in toto*. The plaintiff had the audacity to append all of the appendices furnished and G prepared by the JV as proof of works done and entitlement to compensation. This total incorporation of the first defendant's claim and proof of claim casted away any shade of doubt over the first defendant's entitlement and performance. This was a clear indication that there were works done and there was payment due to the first defendant. Thus, the H first defendant was entitled to its portion of the *ex gratia* payment. (paras 75, 76 & 79)

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(5) The plaintiff had received the first defendant's entitlement and it was their duty to account the same entitlement to the first defendant. This was exactly a case of a constructive trust. When the first defendant was deprived of its entitlement, it naturally entailed that the first defendant was aggravated, and the plaintiff was enriched at the expense of the first defendant's aggravation. Indeed, the retention of the entitlement was unjust. Gerbang Perdana had no rights in good conscience to retain the monies from the *ex gratia* payment which the first defendant was entitled to. The plaintiff had ultimately failed to prove its case on the balance of probabilities and therefore was not entitled to the reliefs sought in its statement of claim. (paras 92, 97, 98, 102 & 108)

Case(s) referred to:

Anglia Television Ltd v. Reed [1972] 1 QB 60 ***(refd)***
Asiapools (M) Sdn Bhd v. IJM Construction Sdn Bhd [2010] 2 CLJ 28 CA ***(refd)***
Blue Sea Pools Swimming Centre (Klang) Sdn Bhd v. Loo Ah Chew & Sons Sdn Bhd [2003] 1 LNS 121 HC ***(refd)***
Boustead Trading (1985) Sdn Bhd v. Arab Malaysian Merchant Bank Bhd [1995] 4 CLJ 283 FC ***(refd)***
CCC Films (London) Limited v. Impact Quadrant Ltd [1985] 1 QB 16 ***(refd)***
Charles Grenier Sdn Bhd v. Lau Wing Hong [1997] 1 CLJ 625 FC ***(refd)***
Dream Property Sdn Bhd v. Atlas Housing Sdn Bhd [2015] 2 CLJ 453 FC ***(refd)***
Hassan Kadir & Ors v. Mohamed Moidu Mohamad & Anor [2011] 5 CLJ 136 FC ***(refd)***
Ho Kam Phaw v. Fam Sin Nin [1998] 3 CLJ 708 CA ***(refd)***
Ho Shee Jan v. Stephens Properties Sdn Bhd [1984] 1 LNS 155 HC ***(refd)***
Koh Siak Poo v. Sayang Plantation Bhd [2002] 1 CLJ 501 CA ***(refd)***
Kwan Chew Holdings Sdn Bhd v. Kwong Yik Bank Bhd [2007] 2 CLJ 127 CA ***(refd)***
Leisure Dotcom Sdn Bhd v. Globesource Sdn Bhd [2015] 1 LNS 643 CA ***(refd)***
McRae v. Commonwealth Disposals Commission [1951] 84 CLR 377 ***(refd)***
New Selangor Plantations Sdn Bhd v. Talam Management Services Sdn Bhd [1996] 4 CLJ 94 HC ***(refd)***
Pentadbir Tanah Wilayah Persekutuan Kuala Lumpur v. Sekutu Eksklusif Sdn Bhd; Tenaga Nasional Bhd (Intervener) [2010] 1 LNS 1272 HC ***(refd)***
Re Vandervell's Trusts (No 2), White and Ors v. Vandervell Trustees Ltd [1974] Ch 269 ***(refd)***
Takako Sakao v. Ng Pek Yuen & Anor [2010] 1 CLJ 381 FC ***(refd)***
Tan Leng Choo & Ors v. Law Teck Huat [2008] 1 LNS 568 CA ***(foll)***
Tay Choo Foo v. Tengku Mohd Saad & Ors And Another Appeal [2009] 2 CLJ 363 CA ***(refd)***

Legislation referred to:

Evidence Act 1950, s. 114(g)
Rules of Court 2012, O. 18 r. 17

A *For the plaintiffs - Stanley Chang (Cheryl Tay Shieh Chin with him); M/s Stanley Chang & Partners*

For the 1st defendant - Nitin Nadkarni (Aaina Liyana Abd Manaf & Yuvaraj Sugapathy with him); M/s Lee Hishammuddin, Allen & Gledhill

For the 2nd defendant - Chetan Jethwani (Goh Hui Ring & Ernestine Khoo Bee Wah with him); M/s Goh Partnership

B *Reported by Suhainah Wahiduddin*

JUDGMENT

Azimah Omar JC:

C **Background Facts**

[1] This is a civil suit filed by the plaintiff against the defendants pertaining to the famous crooked bridge which was intended to serve as a second linkage between Malaysia and Singapore which did not materialise.

D **[2]** Basically, this suit revolves around a construction contract, known as "Design, Construction, Completion and Commissioning of Gerbang Selatan Bersepadu Road Bridge, Rail Bridge and Associated Works at Johor Bahru, Johor ("Bridge Contract") and a construction contract known as "Design, Construction, Completion and commissioning of Integrated Customs, E Immigration and Quarantine Complex at Johor Bahru, Johor ("CIQ Contract") wherein both of the Contracts were combined into one development project named as "Projek Gerbang Selatan Bersepadu" ("the GSB Project").

[3] The plaintiff was appointed by the Government of Malaysia F (Government) as the main contractor to carry out the GSB Project ("Main Contract"). The plaintiff then divided the scope of the GSB Project into several packages and one of the packages under the Bridge Contract was "land approach RBS 03" ("the Sub-Contract or RBS 03 Sub Contract"). This suit, however only concerns the RBS 03 Sub-Contract.

G **[4]** It is to be noted here that before the trial proceeded, the parties have agreed that the issue of liability shall firstly be determined by this court while the issue of quantum will only be decided at the quantum stage if liability is then established.

H **[5]** It is also to be noted that in the midst of the trial, the first defendant (first defendant) and the second defendant (second defendant) had resolved the original claim between the second defendant and the first defendant by the entry of a consent order dated 30 June 2015. And thus, the issue of liability herein to be decided by this court is only in respect of the plaintiff's

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claim against the defendants. However, from the pleadings filed before this court, it is clear that no claim has been made by the plaintiff against the second defendant. The pleadings indicate that the second defendant is a party to this action merely because it is a joint venture partner of the first defendant and accordingly, a party to the RBS 03 Sub Contract.

[6] This court must highlight here that this present suit, being a construction-related matter, the parties had filed into this court pleadings that run to hundreds of paragraphs as well as an enormous amount of contents and voluminous bundles of documents. Whereas, as a matter of fact this case is basically a claim in respect of work done in furtherance of an agreement, and the entitlement of payments for the work done. It is merely a case of a claim for *quantum meruit*.

[7] Despite the hefty outlook of the present case, this court does not find it necessary to go at an extremity of lengths to decide on the issue liability arise in this suit. In fact, some of the major contention of the parties (particularly the plaintiff's) is verily a non-issue to begin with, and has no bearings at all to the indubitable conclusion of the case.

[8] The plaintiff in this case is Gerbang Perdana Sdn Bhd, a limited company incorporated in Malaysia under the Companies Act 1965. This court takes cognisance that Gerbang Perdana Sdn Bhd (Gerbang Perdana) was incorporated solely for the GSB Project.

[9] The first defendant (MTD ACPI Engineering Berhad (formerly known as "ACP Industries Berhad") and the second defendant (IC & E Group Sdn. Bhd) are in essence an unincorporated Joint-Venture ("JV") bound by a Joint-Venture Agreement dated 5 August 2003.

[10] The nexus between these parties are primarily hinged on the two contracts mentioned earlier ie, the main contract and the RBS 03 Sub-Contract. Firstly, the contract between the Government and Gerbang Perdana dated 1 August 2003 for the complete construction of the Gerbang Selatan Bersepadu Road Bridge at Johor Bahru, in which the Government has appointed Gerbang Perdana as their main contractor ("main contract"). Secondly, the RBS 03 Sub-Contract between the JV (the defendants) and Gerbang Perdana for performing a portion of works under the main contract.

[11] The crux of the dispute arose when the main contract was repudiated by the Government on 12 April 2006. The Government then ordered Gerbang Perdana to submit its claim for works done, inclusive of the claims of any third parties aggrieved by the termination. Gerbang Perdana then undertook against the Government to collect claims, proof of claims and thoroughly and properly assess the claims of third parties (inclusive of the

JV) in its letter to the Government dated 7 July 2006. The first defendant then duly submitted its claims to Gerbang Perdana with documentary proofs. It was admitted and undisputed that Gerbang Perdana has incorporated the first defendant's claim *in toto* and had even appended the whole documentary evidence of the first defendant's claim in Gerbang Perdana's final claim to the Government dated 8 September 2006. There were countless reiterations and references of the RBS 03 Sub-Contract in numerous correspondences between the plaintiff and the Government. It entails that consequent to Gerbang Perdana's final claim, the Government has issued an *ex gratia* payment of RM154,999,999 to the plaintiff to cover the whole extent of the claims from the third parties claimed *vide* the plaintiff (inclusive of the first defendant's claim). This court also takes cognisance and acknowledges the fact that it is undisputed that the Government of Malaysia had paid a sum of over RM257 million to Gerbang Perdana by the end of November 2006, of which RM102 million was for works done and RM155 million was for compensation. (see exh. D220 at p. 642, B10)

[12] Astoundingly, after claiming the full width and breadth of the first defendant's claim the plaintiff refuses to furnish the payment to the first defendant for its portion of work done and claimed. Perplexing to say the least, the grounds in which Gerbang Perdana refused payment were that:

i. The Sub-Contract has been terminated *vide* a tri-partite meeting between the parties in 13 February 2006.

ii. The first defendant had not performed what it has claimed (which amazingly was admitted to have been performed) and has been adequately paid with an interim payment in which Gerbang Perdana (against its own admission and representation to the Government) contends to be the only work done by the first defendant.

[13] The plaintiff in this action, prays to this court for a declaration that the Sub-Contract has been mutually terminated and that the first defendant is not entitled to claim against the plaintiff.

[14] The first defendant's case, on the other hand is that the parties have only agreed to agree to mutually terminate the RBS 03 Sub Contract due to the termination of the main contract by the Government. And it is therefore the contention of the first defendant that there are two issues to be decided by this court at this liability stage of the proceeding, namely;

(i) Whether the Sub-Contract was mutually terminated 13 February 2006; and

(ii) Whether the first defendant is entitled to obtain the benefit of the compensation paid by the Government under the main contract to the plaintiff, in respect of the first defendant's works under the Sub-Contract.

[15] The first defendant in its statement of defence and counterclaim is counterclaiming *inter alia* for:

(i) Damages in the amount of RM21,551,065.43, or as assessed by this Honourable Court;

(ii) Further or alternatively:

(a) an order that the plaintiff account to the first defendant for all moneys received by it from the Government in respect of the first defendant's works;

(b) an order that the plaintiff pay to the first defendant all sums found to be due to the first defendant upon the taking of such account.

Preliminaries

The Tenure And Survivability Of The Sub-Contract Is Irrelevant To The First Defendant's Entitlement For Payment Under The Sub-Contract For Work Done

[16] Now, just the mere iteration of Gerbang Perdana's grounds of refusal irks this court's judicial and legal senses. It is patently clear that the entitlement or non-entitlement over the payment is contingent upon work done, and evidences proving work done. The entitlement to pay for work done is not contingent or dependent on the survivability of a contract. Even if a contract was subsequently terminated, whatever obligations to pay that arose during the tenure and life of that contract remains even after the demise of the contract.

[17] It would be unimaginable that partisans to a contract can escape unscathed and totally eschewed from their payment obligations accrued during the tenure of the contract just because the contract was terminated. It is already a time tested rule of compensation that either Expectation Interest, or Reliance Interest (not both) be paid for in case a contract is repudiated to bring parties as close as possible to the position as if the contract was never entered into. And this is exactly the intent of the Government when it ordered Gerbang Perdana to collect and itemise claims from third parties aggrieved from the termination, and also the represented intent of Gerbang Perdana in undertaking to collect third party claims from sub-contractors and assess their claims for work done. The parties are in a mutual state of mind that sub-contractors are to be compensated for the work done which is a payment of Reliance Interest. The sub-contractors (particularly the first defendant) has relied on the Sub-Contract and performed works at their own expense. It is only natural and common sense that notwithstanding the survivability of the Sub-Contract the obligation to pay for work done encompasses the life and demise of the contract and an aggrieved party to a repudiation of a contract is entitled to be compensated for expenses incurred in reliance and/or furtherance of the contract.

[18] Now, in this present case, even assuming that this court were to agree with the plaintiff that the Sub-Contract has been terminated, it is this court's view that it does not derail from the legal consequence that the first defendant remains entitled to compensation for works done.

[19] It is utterly incredulous that this court agrees that a party to a contract may only claim for compensation for work done only during the tenure and life of the contract. This is verily preposterous.

[20] This court has had the opportunity to critically assess the supposed six Broad Terms ("Broad Terms") of Mutual Termination contended by the plaintiff which was supposedly encapsulated in numerous Drafts Deed of Termination which were never executed by any of the parties. And, a plain reading of these supposed Broad Terms would identify that the terms assimilate the same principle discussed here by this court.

[21] Although one of the Broad Terms stipulates that "there shall be no claims whatsoever and howsoever between the parties …", numerous terms in the draft deed of settlement clearly stand for the first defendant's entitlement of payment for work done, and the first defendant's rights to legally pursue its entitlements if the plaintiff defaults in its payment of the first defendant's entitlement. Thus, further enforcing the fact that the termination of the Sub-Contract has no bearing at all to the first defendant's right to claim for compensation for works done:

> D. The Works have only been partially been completed by the JV and the portion of the works so completed … herein (hereinafter referred to as the "Work Done"). The parties have carried out and completed joint measurement of the completed works on the ... .
>
> 4. The Parties hereby agree that the Employer (in the present case, Gerbang) shall pay to the JV the sum of ... only (hereinafter referred to as the "Progress Sum") in full and final payment of … the Works completed …
>
> 8. Should the Employer make default in payment of any of the amounts under this Deed … the JV shall, be entitled to recover the defaulted sum from the Employer.

See *McRae v. Commonwealth Disposals Commission* [1951] 84 CLR 377; *Blue Sea Pools Swimming Centre (Klang) Sdn. Bhd. v. Loo Ah Chew & Sons Sdn. Bhd.* [2003] 1 LNS 121; [2003] MLJU 139; *Anglia Television Ltd v. Reed* [1972]1 QB 60; *CCC Films (London) Limited v. Impact Quadrant Ltd* [1985] 1 QB 16.

[22] Thus from the very outset, be that as it may the Sub-Contract was terminated, to which this court disagrees, the first defendant shall still be entitled to the payment for any work done, proven and admitted by the parties.

The Correct Test To Determine Entitlement

[23] The litmus test to the entitlement then, is no longer whether or not the first defendant is entitled to the compensation under the subsisting Sub-Contract. Instead the test is whether or not the first defendant has successfully proven works done which entitles the first defendant for a portion of the *ex gratia* payment retained and refused by the plaintiff, Gerbang Perdana.

The First Defendant Is Not Bound By The Second Defendant's Pleadings Merely Because The Defendants Are An Unincorporated JV

[24] It is not a surprise that the second defendant would contend in agreement with the plaintiff since Gerbang Perdana and the second defendant was managed and run by two brothers (Dato' Yahya Abdul Jalil, the Managing Director of the plaintiff and Hamzah Abdul Jalil, the Managing Director of the second defendant). The second defendant by and large shadows the plaintiff's contentions.

[25] It was Gerbang Perdana's contention that the first defendant is bound by the pleadings second defendant which is in favour of Gerbang Perdana's position. Gerbang Perdana placed reliance on the case of *Kwan Chew Holdings Sdn Bhd v. Kwong Yik Bank Bhd* [2007] 2 CLJ 127 decided by the Court of Appeal. The Court of Appeal then decided that joint-venturers are principal and agent to each other and should be deemed as one single party.

[26] However, it is totally deplorable that the plaintiff were to submit to this court, a decision which was reversed outright and set aside by the Apex Court of this country, the Federal Court. Adding insult to the impropriety of this submission is the fact that the decision was reversed exactly on the legal preposition which the plaintiff is relying upon. The Federal Court in direct reference to the Court of Appeal's ruling which was relied upon by the plaintiff has explicitly iterated that:

> We regret to say that this proposition is too far-fetched and has gone beyond the bounds permitted by law.

[27] Furthermore, the decision in the Court of Appeal has no mention at all that joint-venturers shall be bound by any one of the joint-venturers' pleadings. That was not at all the Court of Appeal's ruling. The plaintiff has submitted to this court a totally fallible, untenable, incorrect and inaccurate extrapolation of the law derivative from the Court of Appeal's decision. A simple reading of the issues itemised by the Court of Appeal's decision in *Kwan Chew* is sufficient to identify that there was no mention at all on any rules on pleadings between joint-venturers. The only issue of a joint-venture was the propriety, position and consequence of the appointment of an independent accountant in the project, whether that accountant may be deemed as a joint-venturer:

The catchwords in the Court of Appeal decision read:

> BANKING: Banker and customer - Overdraft facility for housing project - Whether facility a bridging loan - Whether relationship between parties became fiduciary - Whether bank's failure to credit customer's account with end finance monies rendered project incomplete resulting in losses to customer
>
> CONTRACT: Breach - Overdraft facility for housing project - Bank's failure to credit customer's account with end finance monies - Whether project rendered incomplete resulting in losses to customer

The issue and questions brought forth and dealt with by the Court of Appeal are:

> The issues were: (1) whether the contract between the parties was in fact a bridging facility; (2) whether the interest should be taken into account when determining whether the plaintiff exceeded its overdraft limit; (3) whether the plaintiff breached the contract; (4) whether the plaintiff was not entitled to damages as it was only a member in the group of companies that were the defendant's customers; and (5) whether the defendant's appointment of an independent accountant to manage the said project was warranted since 95% of the said project was already completed as at the material time and also since the defendant continued to dishonour the plaintiff's cheques despite the fact that they were signed by the independent accountant signifying the necessity and the propriety of the payments thereof.

[28] There is simply a total absence of any mention, of any ruling or rule of law regarding pleadings in the entire decision of the Court of Appeal especially between joint-venturers.

[29] Thus, preliminarily this court does not hesitate to find that the first defendant is not by any means or lengths, bound by the second defendant's pleadings.

The Sub-Contract Has Not Been Mutually Terminated *Vide* The Tripartite Meeting, The Negotiations On The Six Broad Terms And Even The Exchange Of Draft Deeds Of Termination

[30] It is reiterated here that there is really no necessity for this court to delve into the factum that of the subsistence or the termination of the Sub-Contract. It simply does not matter. Nevertheless, for the sake of completion, and to further highlight the folly of the plaintiff's case, this court shall further decide on the subsistence of the Sub-Contract.

[31] The plaintiff has arduously argued that a mutual termination has been agreed upon during a tripartite meeting between Gerbang Perdana, the first and second defendant conducted on the same day of 13 February 2006

("tripartite meeting") after an initial meeting held on the same day. Again, there are plentiful admissions by the plaintiff itself that this is indeed not the proper position of the parties. Instead, this court finds that it is more probable than not that no such mutual termination was agreed upon either during the tripartite meeting, the exchange of correspondences and even in the exchange of draft deeds of termination which were never agreed upon and executed.

[32] Now, although the plaintiff's witnesses all contended that such mutual termination was agreed upon during the tripartite meeting, it is vividly clear that their testimony does not stand the test of the cross-examinations and more importantly the contemporaneous documents. It is a set rule of law that contemporaneous documentary evidence trumps over, and has greater probative value against self-serving oral evidences. (see *Leisure Dotcom Sdn Bhd v. Globesource Sdn Bhd* [2015] 1 LNS 643 (Court of Appeal)).

[33] Thus, this court does not hesitate to disregard self-serving oral testimonies which are in direct contradiction with admissions in contemporaneous evidences.

Admissions Of Subsistence Of Sub-Contract In Contemporaneous Documentary Evidence Submitted In Court

i. Plaintiff's Own Admissions **Before** Conducting The Tripartite Meeting

[34] In anticipation of the meetings in negotiation of a prospect of termination, Gerbang Perdana *vide* Yoong Hoi Shing (Executive Director of the plaintiff – PW2), in a letter dated 11 January 2006 (Tab 3, B20) admitted that:

> All issues shall be dealt with in the proposed negotiations without prejudice and once settled, recorded in a settlement agreement …

[35] Again, in Gerbang Perdana's letter dated 7 February 2006 [Tab 4, B20], Yoong wrote and admitted that:

> All issues shall be dealt with in the proposed negotiation without prejudice and once settled, recorded in a settlement agreement …

ii. Plaintiff's Own Admissions After The Tripartite Meeting

[36] In the plaintiff's own minutes of the tripartite meeting dated 14 February 2006 [Tab 8, B20] it was admitted and recorded that:

> 6. The negotiation on the dispute or difference was concluded with no resolution.
>
> 7. In view of the conclusion, both parties agreed to consider invoking mutual termination and to work out the details.

[37] This piece of documentary evidence is overwhelmingly indicates that even the plaintiff believes that there was no mutual termination agreed upon. It is blindingly clear that the parties were still working out the details and this court must stress that the parties merely considered the prospect of a mutual termination. When anyone is considering anything, it plainly means that one has not reached to any decision and/or conclusion.

[38] This admission is further reinforced by another piece of important document which is Gerbang Perdana's letter dated 15 February 2006 [Tab 9, B20] which Gerbang Perdana stands to unequivocally admit:

> We refer to Negotiation Meetings between Employer and Contractor held on 10 February 2006 and 13 February 2006 … We regret to note that the Parties have failed to reach any agreement for the settlement of the disputes and issues raised …

[39] There is not even any room for doubts here, that even the plaintiffs are in agreement that there was nothing concluded or agreed upon during the tripartite meeting.

[40] Accurately and accordingly, the JV records the same (fact that there was no final and conclusive agreement to terminate the Sub-Contract) in their reply letter to Gerbang Perdana, dated 16 February 2006, in which was never negated by the plaintiff.

[41] In fact, it was further acknowledged and admitted by Gerbang Perdana in its reply letter to the JV dated 21 February 2006 [Tab 14, B20] that:

> The details of the mutual termination are to be further worked out and finalised by all parties concerned.

[42] The court is verily aware that it is in the same letter above as well that Gerbang Perdana proposed the six Broad Terms ("Broad Terms") of termination which the plaintiff alleged to have been accepted by performance *in lieu* of a signed and executed contract (which this court vehemently disagrees). However, this court shall deal with the tangent of termination *vide* the tripartite meeting and the Broad Terms separately as these points of supposed termination differs in time. The court's finding on the Broad Terms shall be dealt with later in this judgment.

iii. Plaintiff's Own Admission And Representation Leading Up To The Final Consolidated Claim To The Government

[43] In admission of the subsistence and operability of the Sub-Contract even AFTER the tripartite meeting, the negotiations of the Broad Terms, and the exchange of draft deeds of termination, the plaintiff has requested the first defendant to submit its claim in clear adherence and reliance of cl. 29 of the conditions of contract contained in the Sub-Contract. (see Gerbang Perdana's letter dated 5 May 2006 [Tab 34, B20])

[44] This is verily important to note. This directly contradicts the plaintiff's contention that the parties have reached a mutual termination of the subcontract AFTER the tripartite meeting, the negotiations of the Broad Terms, and the exchange of draft deeds of termination. If indeed the Sub-Contract has been terminated then, there is no reason for the plaintiff to request for the claim by purview of a provision of the supposedly terminated Sub-Contract.

[45] Most pertinently, besides the fact that it has been admitted and represented between the parties that the Sub-Contract subsists, the plaintiff also admits and represents the same to the Government. Ad Verbatim, Gerbang Perdana in its final claim to the Government dated 8 September 2006 unequivocally represents, admits and acknowledges to the Government that:

> ACPI and IC & E **IS** (***in the present tense, and not past tense 'was'**) a **Joint Venture** contractor for work package RBS03 (Land Approach). However, final claims were submitted separately to GPSB

(*emphasis added)

[46] Moreover, in the same claim Gerbang Perdana has completely appended the first defendant's appendices in proving their claims. And one of these appendices records the following:

> "Without Prejudice" discussions between the Employer and the Contractor took place between 7 and 13 February 2006 but these discussions were inconclusive, and hence had no effect, as although it was agreed that under the circumstances a mutual termination of the Contract would be preferred solution by all parties, no agreement could be reached on the commercial or contractual terms of any mutual termination … In ACPI's opinion, the alleged mutual termination on 15 February 2006 was overtaken by the subsequent events thereafter … Clearly the Employer, prior to that time did not consider the Contract to have been mutually terminated

[47] Now, the plaintiff is threading dangerous waters here in their contention. If indeed the Sub-Contract has been mutually terminated, then, Gerbang Perdana's representation to the Government is akin to a falsification and a false misrepresentation. Bearing in mind that the final claim's amount goes to a massive amount in the hundreds of millions, such false misrepresentation cannot be taken lightly. Thus, the most probable fact must be that the Sub-Contract remains subsisting and has not been mutually terminated.

[48] It is opportune at this juncture, while referring to Gerbang Perdana's representation to the Government that this court swiftly addresses the plaintiff's contention that the separation of claims between the defendants is

a proof of termination. Clearly with the representation above, the plaintiff itself acknowledges that the separation of the claims does not derogate from the fact that the JV still subsists. Thus, it is not any proof of a mutual termination, if the claims were made separate or otherwise.

[49] Now, in light of all the above countless admissions by the plaintiff, there is no room at any lengths or measure at all for any doubt as to the subsistence of the Sub-Contract. These documentary evidences staunchly indicate as such. Thus, it would be utterly unjust and verily prejudicial as well as detrimental against the first defendant if this court were to allow the plaintiff to contradict the *status quo* represented and admitted by itself. This court cannot allow the plaintiff to simply elect to go for or against its own contention and representation as and when it is to their benefit. The plaintiff should be estopped from contending such injustice.

[50] This court finds valuable guidance from the decision of the Federal Court in the case of *Boustead Trading (1985) Sdn Bhd v. Arab Malaysian Merchant Bank Bhd* [1995] 4 CLJ 283; [1995] 3 MLJ 331 had referred to Lord Denning's decision in the Amalgamated Investment case which reads:

> The width of the doctrine has been summed up by Lord Denning in the Amalgamated Investment case (at p 122) as follows:
>
> The doctrine of estoppel is one of the most flexible and useful in the armoury of the law. But it has become overloaded with case. That is why I have not gone through them all in this judgment. It has evolved during the last 150 years in a sequence of separate developments: proprietary estoppel, estoppel by representation of fact, estoppel by acquiescence, and promissory estoppel. At the same time, it has been sought to be limited by a series of maxims: estoppel is only a rule of evidence, estoppel cannot give rise to a cause of action, estoppel cannot do away with the need for consideration, and so forth. All these can now be seen to merge into one general principle shorn of limitations. *When the parties to a transaction proceed on the basis of an underlying assumption either of fact or of law – whether due to misrepresentation or mistake makes no difference – on which they have conducted the dealings between them – neither of them will be allowed to go back on the assumption when it would be unfair or unjust to allow him to do so.* (emphasis added)

See also *Pentadbir Tanah Wilayah Persekutuan Kuala Lumpur v. Sekutu Eksklusif Sdn Bhd; Tenaga Nasional Bhd (Intervener)* [2010] 1 LNS 1272; [2010] MLJU 1303; *Ho Shee Jan v. Stephens Properties Sdn Bhd* [1984] 1 LNS 155; [1986] 2 MLJ 43.

iii. The Six Broad Terms Were Never Agreed Upon By The Defendants

[51] Another tangent in which the plaintiff sought to prove a mutual termination is from the aspect of the Broad Terms which were proposed in the Gerbang Perdana's letter dated 21 February 2006.

[52] It actually begs for no further discussion. It is plain to understand that the negotiations regarding the Broad Terms all took place within the month of February in the year 2006 which was BEFORE Gerbang Perdana's final claim to the Government was made (of which Gerbang Perdana admits and represents the subsistence of the Sub-Contract). Thus, since the admission to the Government was made after the negotiation of the Broad Terms, it is by no means that the Broad Terms were agreed upon and caused the Sub-Contract to be terminated.

[53] Even if this court were to entertain this contention, it is patently clear from the negotiation over the Broad Terms that the Broad Terms were discussed to the oblivion. Nothing was agreed, nothing was absolute, nothing was signed and executed, and ultimately there was no mutual consensus on the termination of the Sub-Contract. Even the plaintiff's letter of 21 February 2006 made an admission that the Broad Terms should be "further worked on and finalised …".

[54] Even the second defendant wrote in reply in the form of a counter-offer *vide* its letter to Gerbang Perdana dated 27 February 2006 in which the second defendant sought for an amendment to include new terms.

[55] It is already settled law that counter-proposals/offers are not by any stretch of the legal and logical imagination, a qualified acceptance. (see *New Selangor Plantations Sdn Bhd v. Talam Management Services Sdn Bhd* [1996] 4 CLJ 94 HC)

Absence Of Response To Gerbang Perdana's Letter Is Not An Unqualified Acceptance

[56] It was also contended that the first defendant has admitted the proposed Broad Terms in failing to respond to Gerbang Perdana's letter dated 21 February 2006. Against this contention, this court has two retorts. Firstly, even if there is any absence of response, the letter by the plaintiff itself admits that the Broad Terms were not finalised and agreed upon. Secondly, although a fact may be admitted by absence of response, but an acceptance of a contract cannot be inferred from an omission, or negative act. It begs no further iteration. Silence is NOT an acceptance.

Performance Of The Broad Terms Is Insufficient To Prove Acceptance Due To The Existence Of An Agreement To Agree

[57] Here, this court is faced with the applicability of two valid doctrines of construction of contract. Gerbang Perdana on one hand relies on the case of *Asiapools (M) Sdn. Bhd. v. IJM Construction Sdn. Bhd.* [2010] 2 CLJ 28 which upheld the doctrine of acceptance *vide* performance of terms of a contract. Indeed, the law is no stranger to the inference of an acceptance

derivative of positive acts in performance of a contract (though not signed or executed). On the other hand, the first defendant relies on the doctrine of construction that in cases where there exists a fact that there was an agreement to agree to an execution of a formal contract, nothing short of such formal contract signed and executed is sufficient to bring the contract in existence. The first defendant relied upon the Court of Appeal decision in *Ho Kam Phaw v. Fam Sin Nin* [1998] 3 CLJ 708. It was also decided by the Federal Court in *Charles Grenier Sdn Bhd v. Lau Wing Hong* [1997] 1 CLJ 625 that:

> An agreement to make an agreement does not result in a contract

[58] Now, before going any further with this issue, this court must highlight here that this court is also mindful that the decision of the Court of Appeal in *Ho Kam*'s case has been reversed by the Federal Court. No doubt that it was overturned, however the setting aside of the Court of Appeal decision has no mention of the principle of an agreement to agree requiring an explicit contract to be signed. It was reversed on other grounds.

[59] Instead, the Federal Court hinges its decision on the fact that there was indeed a positive affirmation and agreement over the content of the draft agreement which is exactly a non-existent fact in the present case:

> There was a concluded agreement on 9 July 1996 when the appellants executed the copies of the faxed draft settlement agreement as it was essentially the same as the first draft agreement which had been agreed to earlier by both parties.

[60] The Federal Court in its decision does not deal and has not ruled against the other part of the Court of Appeal's decision that stipulates that nothing short of a signed contract is sufficient to bring a contract into existence if parties have agreed that the terms shall be concluded in a formal contract.

[61] Thus, the principle relied upon by the first defendant remains a good law. Even more so when the same principle was followed yet again in another Court of Appeal decision close to a decade after *Ho Kam*'s case in the case of *Tan Leng Choo & Ors v. Law Teck Huat* [2008] 1 LNS 568; [2009] 1 MLJ 820. This court is practically bound to follow this precedent.

[62] Now, the rules and doctrines of construction must be in harmony. This court does not intend to contra any of these rules. However, what determines the applicability of one of these rules over the other, this court opines depends largely on the facts of each case. It is trite that this court shall treat alike cases alike and different cases differently. Now, generally indeed an acceptance might be inferred from a positive act, such as the performance of the terms of a contract. However, the other rule of construction steps in

and takes the helm where there exist specific fact(s) and variable(s) which deem the other doctrine appropriate. And the present case is an exact example of this specific fact (which is the fact that the parties have agreed to conclude their differences in a formally executed contract). Thus, when this fact exists, then the primary rule is that nothing short of that formally signed and executed contract shall be sufficient bring the contract into existence. These rules of construction cannot be at odds with each other. Consequently, when this fact exists, then the doctrine of acceptance through performance can no longer apply and should be distinguished. It is here that the facts determine the appropriate doctrine to apply. It is here that derivative from the facts, the present case distinguishes itself from the doctrine of acceptance by performance and fall within the doctrine of an agreement to agree to a formal contract requires a formal, signed and executed contract to put the contract in existence.

[63] Thus it is this court's finding that it is irrelevant even if the plaintiff is able to prove that the Broad Terms were performed as a performance of the Broad Terms is insufficient considering the fact that the parties have agreed that their disputes shall be concluded in a formally signed and executed contract.

It Is Insufficient In The Present Case To Prove The Existence Of The Contract Of Termination From The Exchange Of Drafts Of Deed Of Termination And The Exchange Of Correspondences, Considering The Fact That The Parties Have Agreed To Conclude The Dispute And Terms In A Formally Signed And Executed Contract

[64] Again this court is faced with the applicability of two valid doctrines of construction of contract. Both the plaintiff and the first defendant relied on the case of *Charles Grenier Sdn. Bhd. v. Lau Wing Hong* [1997] 1 CLJ 625.

[65] The difference being that the plaintiff extrapolated an isolated excerpt of the decision, to bend the actual decision into a distorted supposition that serves their interest. It is plainly a misleading quotation. The full quotation of the relevant portion of the decision reads:

> An agreement to make an agreement does not result in a contract. It is for the court in each case to construe the correspondence exchanged between the parties and to say whether that is the result intended by the parties. If the court reaches an opposite conclusion, then there is an enforceable contract.

[66] Indeed a contract may be construed from an exchange of correspondences. However, the preceding qualification is that an agreement to make an agreement does not result in a contract. And as was held earlier above, the existence of the specific fact that the parties agreed to conclude

their dispute and terms *vide* a formal contract, deems that the doctrine that an agreement to agree to a formal contract requires the execution of a formal agreement takes precedence.

[67] Again, the exchange of draft deeds of termination took place in February 2006 which was BEFORE Gerbang Perdana's final claim to the Government. It is admitted even after the exchange of these draft deeds of termination, that the Sub-Contract remains subsisting.

[68] Therefore, in light of the above discussions at length, it is this court's decision that the RBS 03 Sub-Contract was never mutually terminated and remains subsisting.

The First Defendant's Entitlement To Its Portion Of The *Ex Gratia* Payment

[69] It is settled that this court finds that the first defendant is entitled to its portion of the *ex gratia* payment. What is left for determination is the amount from the *ex gratia* payment that should be paid to the first defendant as compensation. As has been stated earlier in this judgment, the determination of the amount the first defendant is entitled to shall be dealt with at the quantum stage.

[70] This court is also well aware of the fact that Gerbang Perdana has contended of work not performed, delays and defaults of the first defendant. However, at this juncture, it is more practical and appropriate for this court to delve into the mass of admissions by Gerbang Perdana over works done by the first defendant.

Gerbang Perdana's Numerous Admissions Of The First Defendant's Work Done And Entitlement To Compensation

Gerbang Perdana's Letter To The Government Dated 11 May 2006 [Tab 38, B20]

[71] In this letter, as prelude, Gerbang Perdana has already admitted and represented to the Government that its claim for compensation shall be consolidated and be inclusive of third party claims who would be aggrieved by the termination of the main contract:

> This claim also includes an estimate of claims from third parties whose contracts had to be duly terminated by us in compliance to the decision by the Government

Gerbang's Letter To The Government Dated 26 May 2006 [Tab 46, B20]

[72] Gerbang Perdana has explicitly made reference to the land approach package in which is the RBS 03 Sub-Contract. The Sub-Contract package between the JV and Gerbang Perdana is exactly for land approach works and the JV is indeed the land approach works contractor. Item 3 of the breakdown of claims by package sub-contractors reads:

Item	Description	Amount (RM)
	...	
3	Cost incurred by Land Approach Works Contractor	3,635,880.67

Gerbang Perdana's Final Claim To The Government Dated 8 September 2006

[73] This is indeed the pinnacle of Gerbang Perdana's admission of the first defendant's works done and also the first defendant's ultimate entitlement to its portion of the *ex gratia* payment.

[74] Preceding this final claim by Gerbang Perdana, the first defendant has submitted its final claim with proof of claims *vide* its letter dated 7 August 2006.

[75] Entailing the above claim by the first defendant, the plaintiff spares nothing at all, not any portion, not any part of the first defendant's claim, and incorporated the first defendant's claim on 7 August 2006 in toto.

[76] Not only that, adding more magnitude to the sheer obviousness of this admission, the plaintiff has had the audacity to totally append all of the appendices furnished and prepared by the JV as proof of works done and entitlement to compensation. (see p. 87, B9)

[77] In fact, the plaintiff's witness (Nurul Huda binti Hashim – PW1) has readily, without reservation admitted to this court that the plaintiff has completely incorporated the first defendant's claim:

NTN Are the figures in respect of ACPI at pages 84 to 86 taken from Exhibit D219 at pages 125 to 126 of Bundle B9 which is Exhibit D219?

NURUL Yes, for the ACPI column, compared to in page 84 and 85; it's the same as that appears in 125 and 126.

NTN So essentially the Plaintiff adopted the First Defendant's claim and incorporated it into the Plaintiff's claim to the Government. Is that correct?

NURUL Yes.

[78] Gerbang Perdana merely changed the cover of the appendices in inserting the appendices into its claim to the Government. The heading by the first defendant entitled "ACPI Submission of Final Account Claims" was simply altered to read "Road Bridge – Land Approach RBS 03 Compensation Appendix AA to AY ACPI – IC & E Joint Venture".

[79] This total incorporation of the first defendant's claim and proof of claims casts away all and any shade of doubt over the first defendant's entitlement and performance. This is a clear indication that there was work done and there is payment due to the first defendant. The only reason that the plaintiff was paid that *ex gratia* payment by the Government is because of the claims and evidences of the first defendant's work culminating the amount of compensation due to all of the sub-contractors (especially the first defendant)

[80] Thus, in light of the above vivid admissions, this court finds that indeed there was work done by the first defendant, and that the defendant is entitled to be compensated for its work done.

Gerbang Perdana's Contention On The Delays And Defaults

[81] It is appropriate at this juncture, having the finding above in mind, that this court addresses Gerbang Perdana's contention on the first defendant's supposed delays and defaults.

[82] Gerbang Perdana contends that due to certain delays and defaults, the scope of work under the package RBS 03 Sub-Contract has been narrowed down, and that the first defendant has been sufficiently remunerated for all its work done *vide* interim payments.

[83] If this is indeed true, then the plaintiff's contention is as good as admitting to making a falsified, inaccurate, and misleading claim to the Government.

[84] It is imperative again, to keep in mind that Gerbang Perdana's claim to the Government completely incorporates the first defendant's claim to the fullest extent, sparing none of it.

[85] If indeed the first defendant has not performed what they have submitted to the plaintiff, then the fact that the plaintiff has falsely claimed against the Government is verily damaging to the plaintiff's credibility.

[86] It is even more perplexing, astonishing even, that the plaintiff's witness has even admitted that they have over-claimed against the Government. The justification afforded was that:

(i) Gerbang Perdana was constrained with time; and

(ii) Gerbang Perdana claimed the full extent to cover other unforeseen expenses.

[87] This court agrees with the defendant that time is a non-issue here. The claim goes up to the hundreds of millions, and Gerbang Perdana has given its undertaking, at numerous times that it would completely and thoroughly assess the claims to submit a proper, accurate, proven claim to the Government.

[88] It is unconscionable if this court would condone such a brazen act. This court will never be an instrument of fraud. And over-claiming against the Government for supposed expenses which was not proven and represented, in the guise and/or cloak of another claim (in the present, the first defendant's claim) is verily fraudulent. It is too blatant, that Gerbang Perdana would simply retain/apply monies paid for the first defendant's work for other purposes than the original purpose the monies were paid.

[89] In any circumstances, this court is minded that fraud is not the defendant's case. Nevertheless, what inference that could be drawn relevant to the present case is that the plaintiff's contention lacks any logic, reason, legality, cohesion and veracity. It is simply the exact opposite of being probable. To say that it is improbable is an utter understatement.

The First Defendant Has Proven Its Case For Unjust Enrichment And Constructive Trust

The First Defendant's Case For Unjust Enrichment And Constructive Trust Has Been Sufficiently Pleaded

[90] This court does not hesitate to dismiss Gerbang Perdana's contention that a case for Unjust Enrichment and Constructive Trust has not been pleaded. It is patently clear that all the facts, contention for both of these cause of action has been sufficiently pleaded. This Court shall not entertain mere question of semantics. It is already set in our own law under O. 18 r. 7 of the Rules of Court that the only content that need to be pleaded are material facts. It is not necessary that the words unjust enrichment and constructive trust is explicitly spelt out in the pleadings. It suffices that the facts pleaded would make up a legal case and/or consequence for the cause of action:

> Pleadings indicative of a case for UNJUST ENRICHMENT
>
> 22. … the Plaintiff is obliged to obtain from the Government any benefit under the Main Contract to the extent that it is application to the Defendant's works … the Plaintiff has a duty to account to the 1st Defendant for any moneys received by the Plaintiff from the Government as compensation … in respect of the 1st Defendant's works.
>
> 23.1 It is common knowledge that the Plaintiff has made substantial claims and received substantial payments from the Government arising out of … the 1st Defendant's works … However, the Plaintiff has not disclosed or accounted to the 1st Defendant how much payment and/or compensation was received in respect of the 1st Defendant's claims.

[91] There is no doubt here that the first defendant's case is that the plaintiff has unlawfully retained the payment in respect of the first defendant's works.

A Pleadings indicative of a case for CONSTRUCTIVE TRUST

> 22. … the Plaintiff has a duty to account to the 1st Defendant for any moneys received by the Plaintiff from the Government as compensation… in respect of the 1st Defendant's works.
>
> 23.1 It is common knowledge that the Plaintiff has made substantial claims and received substantial payments from the Government arising out of… the 1st Defendant's works …

B

[92] There is no doubt here that the first defendant's case is that the plaintiff has received the first defendant's entitlement and that it is their duty to account the same entitlement to the first defendant. This is exactly a case of a constructive trust.

C

[93] This court is bound and finds guidance from the Court of Appeal decision in the case of *Tay Choo Foo v. Tengku Mohd Saad Tengku Mansur & Ors and Another Appeal* [2009] 2 CLJ 363; [2009] 1 MLJ 289.

D **[94]** The Court of Appeal in this case has decided in plain language that even if a party has pleaded, apart from material facts, legal consequences and law in specificity, it does not deprive the party to extrapolate and draw other different legal consequences from the facts pleaded. The Court of Appeal decided as such in reliance of Lord Denning MR's decision in *Re Vandervell's Trusts (No 2), White and Ors v. Vandervell Trustees Ltd* [1974] Ch 269:

E

> It is sufficient for the pleader to state the material facts. He need not state the legal result. If, for convenience he does so, he is not bound by, or limited to, what he has stated. He can present, in argument, any legal consequence of which the facts permits.
>
> F ... It follows, so it seems to me, that the question for decision in this case is whether the material facts have been set out in the pleadings, not whether Mr Mills made submissions before this court as to legal consequences which had not been set out.

See also *Koh Siak Poo v. Syang Plantation Bhd* [2002] 1 CLJ 501; [2002] 1 G MLJ 65.

Gerbang Perdana's Refusal To Pay And Retention Of Payment Of The First Defendant's Entitlement Amounts To An Unjust Enrichment

[95] Learned counsels for the first defendant has referred to the Federal H Court decision of *Dream Property Sdn Bhd v. Atlas Housing Sdn Bhd* [2015] 2 CLJ 453; [2015] 2 MLJ 441. The Federal Court has encapsulated four elements in proving a case of Unjust Enrichment from a myriad of judgments of the UK House of Lords:

I

i. The Plaintiff Must Have Been Enriched

[96] Upon all of the above admissions by the Gerbang Perdana itself and findings of this court, it is overwhelmingly obvious that the plaintiff has been enriched, when it received and retained the payment which was granted by the Government which was paid in consideration of the first defendant's work done (which has been admitted to have been performed by the plaintiff).

ii. The Enrichment Must Be Gained At The Defendant's Expense

[97] Clearly, the first defendant is entitled to the portion in the *ex-gratia* payment, and when the first defendant is deprived of its entitlement, it naturally entails that the first defendant is aggravated, and the plaintiff is enriched at the expense of the first defendant's aggravation.

iii. The Retention Of Benefit Was Unjust

[98] There is just an absolute absence of any legal, logical, justification for Gerbang Perdana's retention of the first defendant's entitlement. Indeed the retention of the entitlement is unjust.

iv. There Must Be No Defence Available To Extinguish Or Reduce The Plaintiff's Liability To Make Restitution

[99] It is fitting that this court reiterates that to deem the plaintiff's case improbable is an understatement. It is completely untenable and there is no defence at all that the plaintiff may latch onto to exonerate itself from its liability.

[100] Therefore, it is this court's judgement that the retention of the first defendant's entitlement amounts to an Unjust Enrichment.

Gerbang Perdana Indeed Holds The First Defendant's Entitlement To The Ex-gratia Payment As A Constructive Trustee To The Benefit Of The First Defendant

[101] Now, usually the case for Constructive Trust is applied in cases dealing with property. However, the principle is not by any means limited only to cases dealing with property. The principle of Constructive Trust is derivative of the common law doctrine that "equity looks upon as done that which ought to have been done". The court shall construct a trust if a set of facts necessitates the operation of a trust in view of justice and good conscience. Thus, if the court finds that a party have not done what it ought to do, then the court shall construct a trust to remedy that injustice and ill conscience. This is the underlying reason that a holder (vendor) of a property

(which by virtue of a sale contract/deed must transfer the rights to the property to the purchasor) shall be deemed as a trustee because the holder can no longer in good conscience retain the rights to the property.

See *Hassan Kadir & Ors v. Mohamed Moidu Mohamed & Anor* [2011] 5 CLJ 136; *Takako Sakao v. Ng Pek Yuen & Anor* [2010] 1 CLJ 381.

[102] Thus, in application to the present case, indeed Gerbang Perdana has no rights in good conscience to retain the monies from the *ex-gratia* payment which the first defendant is entitled to. Gerbang Perdana ought to pay the portion of the first defendant's entitlement in the *ex-gratia* payment. Thus, in holding the entitlement, Gerbang Perdana holds the entitlement to the benefit of the first defendant.

Miscellaneous

[103] The plaintiff sought to draw an adverse inference under s. 114(g) of the Evidence Act 1950 for the first defendant's supposed failure to call its Managing Director (Khalid bin Abdul Karim) who was an attendee of the Tripartite Meeting to prove their case that the Sub-Contract has not been terminated.

[104] However, the onus to prove lies on the party claiming the existence of a fact. And it is the plaintiff's case to prove that there was a supposed mutual termination of the Sub-Contract.

[105] The burden of proof to disprove the termination does not at any time shift to the first defendant until and unless the plaintiff has successfully proven that there was indeed a mutual termination of the subcontract since the conclusion of the tripartite meeting.

[106] Here, it is patently clear that the plaintiff has not fulfilled its burden of proof. Thus, there is no burden against the first defendant to adduce evidences or witnesses to contra a fact which has not yet been proven.

[107] Therefore, there is no necessity at all for this court to draw such adverse inference as contended by the plaintiff, Gerbang Perdana.

Court's Decision And Directions

[108] In light of all of the above findings, it is this court's decision that the plaintiff has ultimately failed to prove its case on the balance of probabilities and therefore is not entitled to reliefs sought in its statement of claim. This court hereby dismisses the plaintiff's action with costs.

[109] In consequence to the above, this court orders that the issue on the first defendant's entitlement shall be assessed in due course by the court bearing in mind of this court's findings that the Sub-Contract was not mutually terminated and that the first defendant remains entitled for compensation for works done under the Sub-Contract in furtherance of the main contract.

On The Issue Of Costs

[110] Having heard brief submissions from both counsels for the plaintiff and the first defendant on costs, considering both the plaintiff's claim and the first defendant's counterclaim, this court hereby orders the plaintiff to pay the first defendant a sum of RM100,000 in costs. This court also orders that there will be no order as to costs in respect of the second defendant.